NO. 21873

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

The appellant, Robert Parker, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on November 16, 1966. The indictment was brought under Title 18, United States Code, Sections 2113(a)(d)(e), and charged that the appellant had committed six armed bank robberies in the Los Angeles area. The indictment further charged that in each of the robberies appellant forced a hostage to accompany him to the bank in question and assist in the robbery.

On December 19, 1966, appellant pleaded not guilty to all

six counts of the indictment. On March 14, 1967, the case proceeded to trial on four of the six counts of the indictment. The Government dismissed the last two counts of the indictment prior to trial. Appellant was found guilty by a jury on all four counts of the indictment [C. T. 57]. 1/

Appellant was sentenced to serve a term of 25 years imprisonment on each of the four counts of the indictment [C. T. 117]. Appellant's notice of appeal was timely filed on April 17, 1967 [C. T. 111].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 2113(a)(d)(e), 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTES INVOLVED

The indictment was brought under Title 18, United States Code, Sections 2113(a)(d)(e), which provides:

> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or

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1/ "C. T." refers to Clerk's Transcript of Record.

money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny - shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(d) Whoever, in committing, or in attempting to commit, an offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

"(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany

him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

III

QUESTIONS INVOLVED

A. Was appellant's pre-trial line-up so defective as to deprive him of due process of law?

B. Should the testimony of Wilbur Robinson, Jr., have been excluded?

C. Does the provision of the Bank Robbery Act imposing capital punishment if the jury so recommends, burden the assertion of appellant's right to trial by jury in violation of the Sixth Amendment?

IV

STATEMENT OF FACTS

On November 19, 1964, at approximately 10:30 A.M., appellant approached Mr. Jahan Anderson in a parking lot near the U.C.L.A. Medical Center in Westwood [R.T. 113(21)]. 2/ Appellant asked Mr. Anderson to give him a ride to Westwood Boulevard and Santa Monica. After driving a short while appellant

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2/ "R.T." refers to Reporter's Transcript of the proceedings.

forced Mr. Anderson at gun point to pull to the side of the road stating that it was a stick-up [R. T. 113(22)]. Appellant forced Mr. Anderson to turn the car around and together they drove back into Westwood Village and parked next to the Bank of America. Appellant then told Mr. Anderson that "We are going to go into this bank" [R. T. 113(23)]. Next appellant pulled out a pillow case and handed it to Anderson. Appellant told Mr. Anderson that they were going to go into the bank and that Mr. Anderson was to jump over the teller's counter and put whatever money he found inside the pillow case [R. T. 113(25)]. Appellant told Mr. Anderson that if he tried to make any kind of an act or move he would kill him [R. T. 113 (25)].

Appellant then forced Mr. Anderson to accompany him inside the bank. Once inside the bank appellant held his gun on those inside while Mr. Anderson collected the money for him [R. T. 113(26)]. Thereafter Mr. Anderson fainted and appellant fled with $8,636.86.

On July 1, 1965, at approximately 10:30 A.M., appellant kidnapped Mr. Clyde Brooks and forced Mr. Brooks to accompany him to the Bank of America on Jefferson and Hill in Los Angeles [R. T. 181]. Appellant handed Mr. Brooks a pillow case and told him that once they were inside the bank Mr. Brooks was to jump over the teller's cage and collect the money [R. T. 182]. Once inside the bank Mr. Brooks refused to collect the money for appellant [R. T. 183]. Appellant collected the money himself and fled with $3,339.00.

On October 28, 1965, appellant kidnapped Mr. Earl T. Poke while Mr. Poke was stopped at the intersection of Western Boulevard and Adams Boulevard in Los Angeles [R. T. 387]. Appellant handed Mr. Poke a pillow case and indicated that Poke was to assist him in robbing the Security First National Bank at Sixth and Oxford in Los Angeles [R. T. 389]. Appellant forced Mr. Poke to drive him to the bank. Once inside appellant forced Mr. Poke to collect cash from the teller's boxes for him [R. T. 390]. Appellant fled with $2,859.00.

On March 15, 1966, appellant kidnapped Mr. Annis Evans [R. T. 341] at gun point and forced Mr. Evans to drive him to Security-First National Bank on Adams and Crenshaw in Los Angeles. Outside the bank appellant handed Mr. Evans a pillow case [R. T. 396] and told him that he was going to collect the money from the tellers' drawers [R. T. 347]. Once inside the bank appellant forced Mr. Evans to collect the money from the tellers' drawers and, thereafter, appellant fled with $2,400.00.

On October 17, 1966, at approximately 11:00 P. M., Mr. Wilbur Robinson, Jr. left his place of employment to drive home for lunch [R. T. 432]. On the corner of 29th Avenue and Cimarron Mr. Robinson first noticed appellant crossing the street [R. T. 433]. Appellant asked Mr. Robinson for a ride to Arlington Avenue. Shortly after appellant entered the car he forced Mr. Robinson to pull over to the curb and pulled a gun on him. Appellant told Mr. Robinson that he was going to take appellant somewhere and that if he did as he was told he wouldn't get hurt [R. T. 434]. Appellant

forced Mr. Robinson to drive him to the parking lot of the Bank of America on Pico and La Cienega [R. T. 436]. Upon arriving at the parking lot appellant told Mr. Robinson that they were going to rob the bank. Appellant handed Mr. Robinson a pillow case and explained to him that he was to empty all the tellers' cages [R. T. 436]. As the two men walked down Pico Boulevard toward the bank Mr. Robinson threw the pillow case into the air to distract appellant. At the same time Mr. Robinson grabbed appellant from behind and after a battle which extended into an adjacent parking lot, Mr. Robinson succeeded in subduing appellant and holding him until the police arrived [R. T. 439, 440].

Thereafter, a bank security guard found a loaded .38 caliber revolver near the place where the fight had occurred [R. T. 494]. At the police station a search of appellant produced six .38 caliber bullets [R. T. 512].

After appellant's arrest he was placed in a lineup at the Los Angeles Police Department [R. T. 143, 144]. Approximately 150 to 200 people attended the lineup [R. T. 313]. There were ten individuals in the lineup of which at least four and possibly seven wereNegroes [R. T. 169, 313]. The witnesses sat down in an auditorium and were given instructions by the police officials. They were told to be seated and that if they had any questions to remember what they were and to ask them when the lineup was over [R. T. 313].

After the lineup was concluded the witnesses filled out a card indicating the individual that they had identified [R. T. 139,

314]. The witnesses had no discussion between themselves respecting the lineup during the time the lineup was being conducted [R. T. 142]. The witnesses only discussed the lineup and the participants after the identifications were completed [R. T. 142, 173, 314]. Appellant did not have counsel at this October, 1966 lineup. None was ever requested.

V

ARGUMENT

A. APPELLANT'S PRE-TRIAL LINEUP PLAYED A NEGLIGIBLE PART IN HIS IDENTIFICATION AND IN NO WAY DEPRIVED HIM OF DUE PROCESS OF LAW.

Appellant contends that his pre-trial lineup was so unnecessarily suggestive and conducive to mistaken identification that he was denied due process of law. Before examining the nature and quality of the lineup in this case it is appropriate that the Court first be advised as to the types of identification relied upon by the Government so as to place this issue in a proper perspective.

During the course of the trial the Government called some fifteen witnesses to the stand all of whom made an in-court identification of the appellant as the man who robbed the respective banks alleged in the indictment. The record discloses that of these fifteen identification witnesses only five actually attended a lineup in which the appellant appeared [R. T. 123, 154, 312, 332, 361]. Nine

of the identifying witnesses had only seen photographs of appellant prior to their in-court identification [R. T. 113(35), 186, 225, 257, 280, 293, 298, 374, 403]. It was not determined how the remaining one witness had previously identified the appellant [R. T. 365].

Of particular note is the fact that four of the Government's identification witnesses were not the usual type of identification witness who is exposed to a criminal for but a short period of time during the actual commission of a crime. The Government produced four hostages whom appellant had kidnapped at gun point and had been in appellant's company listening to his directions and observing his actions for at least thirty minutes in most instances [R. T. 113(20), 184, 390]. Of these four hostages, only one attended a pre-trial lineup [R. T. 361]. The remaining three merely saw photographs of appellant, among others, prior to their in-court identification [R. T. 113(35), 186, 403].

In light of the overwhelming number of identifying witnesses who never participated in any lineup (nine) it is the Government's position that appellant was not denied due process of law in any way by the pretrial lineup where but five Government witnesses identified him. Clearly the doctrine of United States v. Wade, 388 U. S. 218 (1967), and Gilbert v. United States, 388 U. S. 263 (1967) is inapplicable to the case at bar. Stovall v. Denno, 388 U. S. 293 (1967).

Finally, the identification made by Mr. Earl Poke, one of the hostages, is illustrative that the identifications of appellant met the standard set by the Supreme Court in Wade and Gilbert, supra,

in that the identifications were not the fruit of any earlier identifications made in the absence of appellant's counsel [R. T. 413].

"Q. BY MR. GLASSMAN: In Court on your direct testimony you have identified the defendant Robert Parker as the man who abducted you at the point of a gun on the day in question?

"A. Yes, Sir.

"Q. Is that identification based upon your observing him in this Court room this afternoon?

"A. Yes, Sir."

B. THE TESTIMONY OF WILBUR ROBINSON, JR. WAS ADMISSIBLE AS PROBATIVE EVIDENCE SHOWING APPELLANT'S MODUS OPERANDI AND ESTABLISHING THE IDENTITY OF APPELLANT.

Appellant argues that the testimony of Wilbur Robinson, Jr. was inadmissible because it was offered to show intent and the only issue in the trial was one of identity. A careful reading of the transcript indicates that Mr. Robinson's testimony was admitted to show appellant's modus operandi as well as to prove identity. The testimony was admitted to show that at the time of appellant's arrest he was once again engaging in the exact same course of conduct as that with which he was charged; i. e. abducting a hostage while hitchhiking, forcing him to drive appellant to a bank somewhat removed from the point of the abduction; explaining the details of assisting appellant to rob the bank in question;

handing the hostage a pillow case with which to collect cash from the teller's cages. The trial judge ruled that the testimony of Mr. Robinson was admissible "in view of the offer of proof that it is the identical modus operandi I will permit them to prove it." [R. T. 429].

Proof of other crimes may be admitted to prove a continuing plan, system, or design by a defendant. Evidence of another crime is clearly admissible when the offense is logically connected with that charged, or the acts are so closely and inextricably mixed-up with the history of the guilty act itself as to form part of the plan or system or criminal action. United States v. Crowe, 188 F. 2d 209, 212 (7th Cir. 1951). In the Crowe case, the Court stated that prior offenses offered to prove design or system must bear greater similarity and closer connection in time to the offense charged than when offered to prove intent or motive.

Evidence of another offense cannot be admitted to show a plan if the evidence shows an entirely different system or method of operation. Flood v. United States, 36 F. 2d 444 (9th Cir. 1930), but in the case at bar appellant's actions in regard to Mr. Robinson were identical in every detail to the four offenses with which he was charged.

Mr. Robinson's testimony was also admissible to prove the identity of the defendant. 2 Wigmore, Evidence, Sections 410 and 416. In United States v. Pugliese, 153 F. 2d 497 (2nd Cir. 1945), proof of the illegal manufacture of alcohol by the defendant in his house was admissible to identify him as the owner of alcohol later

found in the house. The only requirement to render such evidence admissible is that identity must be an issue. United States v. James, 208 F. 2d 124 (2nd Cir. 1953).

When dealing with the admissibility of other criminal acts the courts must be guided by the principal that these acts, because of their highly prejudicial nature, are not admissible if offered only to show "a mere propensity or disposition on the part of the defendant to commit the crime." United States v. Stirone, 262 F. 2d 571, 576 (3rd Cir. 1959). In the case at bar, however, Mr. Robinson's testimony was not offered for these purposes. It was offered to prove identity and to show an identical course of criminal action and as such should surely be admissible. Whether the identical criminal act took place prior to or after the offenses charged in the indictment should have no bearing on the admissibility of the evidence so long as it was logically connected with the offense charged and closely mixed-up in point of time with the history of the guilty acts themselves. United States v. Crowe, supra.

C. THE QUESTION OF THE CONSTITUTIONALITY OF 18 U.S.C. SECTION 2113(e) IN NO WAY AFFECTS APPELLANT.

Appellant contends that Title 18, United States Code, Section 2113(e) is unconstitutional in that it impairs his right to trial by jury because by electing to proceed to trial by jury he places his life in jeopardy because only the jury has the power under the

statute to impose the death penalty. This argument was accepted by the United States District Court in New Haven, Connecticut, in a case involving Title 18, United States Code, Section 1201 which contains the identical provision as found in Section 2113(e). Jackson v. United States, 262 F. Supp. 716 (1967). However, it is important to note that Chief Judge Timber's ruling was made on a pre-trial motion before Jackson was forced to decide whether or not to proceed to jury trial. In the case at bar appellant made no pre-trial or trial motions that the statute under which he was indicted and tried was unconstitutional. Appellant elected to proceed to trial by jury. He was convicted by the jury but the judgment indicated guilt without capital punishment [C. T. 109]. Thus, it is evident that appellant's right to trial by jury was in no way impaired. He reaped no harsher consequences from the jury verdict than from the judgment of the Court. Since appellant's argument goes to the possible sentencing power of the jury under the (e) provision of the statute and since the jury did not see fit to exercise their statutory power appellant should not be allowed to raise the constitutionality of the (e) provision which had no effect on his sentence or trial in any way. The (e) provision authorizing the death penalty should not taint the remaining provisions of Title 18, United States Code, Section 2113. As the Supreme Court stated in Champlin Rfg. Co. v. Commission, 286 U.S. 210, 234 (1931):

> " . . . The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of

its remaining provisions - unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

There is no basis for doubting that Congress resolutely intended to make the robbery of a national bank a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose.

Should the Court still wish to proceed to consider the constitutionality of the statute the Government's position is discussed below.

A defendant indicted under the provisions of Title 18, United States Code, Section 2113(e) does not, by attempting to plead guilty or waiving trial by jury, avert the possibility of capital punishment; and, conversely, by electing trial by jury, he does not materially enhance the risk that he will be so punished. The trial judge is not required to approve a waiver of jury trial or accept a plea of guilty.

Gooch v. United States, 82 F. 2d 534, 535 (10th Cir. 1936), cert. denied 298 U. S. 658;

Federal Rules of Criminal Procedure, Rule 23(a).

Furthermore, the Government has the right to compel trial by jury. Singer v. United States, 380 U. S. 24 (1964). And even if the trial judge does approve of jury trial with respect to the issue of guilt

or innocence, or accepts a plea of guilty, he remains free to commence a jury for purposes of recommending appropriate punishment. Seadlund v. United States, 97 F. 2d 742, 748 (7th Cir. 1938). See also, United States v. Dalhover, 96 F. 2d 355 (7th Cir. 1938).

The trial judge in the Jackson case acknowledged the existence of the power, but disparaged it as discretionary and uncertain. We point out, however, that in the majority of the cases under the Kidnapping and Bank Robbery Acts in which capital punishment has been imposed, the trial judge refused to permit the defendant to avoid a jury recommendation on punishment by pleading guilty or waiving trial by jury. 3/

Perhaps, a jury might recommend capital punishment in a case where the judge would have accepted a guilty plea -- but the

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3/ According to the records of the Federal Bureau of Prisons, ten defendants have been (or are awaiting) execution under these provisions. Case reports and Department of Justice records disclose that five pleaded guilty; yet, the question of their punishment was still submitted to the jury. In two other cases, moreover, the plea was refused by the court, either directly or in effect.

To place the issue of this case in perspective, we further note that, according to the Administrative Office of the United States Courts, 563 individuals were convicted under the Kidnaping Act between 1951 and 1966. Of these, 389 pleaded guilty or no contest, 28 were convicted in a trial to the court, and 146 by juries. Four were sentenced to death--three after pleading guilty. Under the Bank Robbery Act, 4482 were convicted in this period, 3690 after pleading guilty or no contest, 86 after trial to the court, 706 after trial by jury. Two were sentenced to death, both after pleading not guilty. (Administrative Office statistics do not, however, differentiate between those who were convicted under the capital and under the non-capital provisions of the statute.) Between 1952 and 1966, according to these same sources, 144 individuals were convicted of rape in the District of Columbia. None was executed. Fifty-four pleaded guilty or no contest, 5 were convicted by the court and 85 by juries.

jury'd determination is not, in our view, binding on the court. It has been held that the concurrence of the trial judge in the jury's recommendation is required. Robinson v. United States, 264 F. Supp. 146, 151-153 (W.D. Ky). This reading conforms to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence; to the mitigative purpose of the provision requiring jury authorization of the death penalty; and to the decisional trend which has sought -- at times in the face of statutory language apparently to the contrary -- to place the most humane construction on capital legislation.

In sum, whether a defendant indicted under the (e) provision of Section 2113 demands a trial by jury, on the one hand, or decides to waive trial by jury or plead guilty, on the other, there is a similar risk of capital punishment. Either way, the concurrence of both court and jury is necessary for its imposition. If the defendant elects to be tried by a jury, the death penalty will be imposed only if the jury so recommends and the judge agrees. If the defendant chooses not to have a jury trial, the judge must first determine whether he would concur in a jury recommendation of capital punishment; if he decides he would, he will convene a jury for punishment and if the jury recommends capital punishment will presumably concur. We see no essential difference in the procedures.

CONCLUSION

For the reasons stated above the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN